IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.12.2007

CORAM:

THE HONOURABLE MR.JUSTICE M.VENUGOPAL

C.R.P.(NPD).No.178 of 2004

1.Doss
2.Malliga ... Petitioners (Judgment Debtor)

Vs.

1.Vamanan
2.Gurunathan ... Respondents (Decree Holder)

Prayer: Petition filed under Section 115 of the Code of Civil Procedure, against the order passed in E.A.No.123 of 2003 in E.P.No.20 of 2003 in O.S.No.2077 of 1997 dated 04.12.2003 by the District Munsif Court, Alandur.

For Petitioners : Mr.L.Damodaran
For Respondents : Mr.V.Kannan

O R D E R

The civil revision petitioners/applicants/judgment debtors have filed E.A.No.123 of 2003 under Or.21, R.106 of C.P.C. in E.P.No.20 of 2003 in O.S.No.2077/97 on the file of District Munsif Court, Alandur, praying to set aside the exparte order dated 11.09.2003. The civil revision petitioners take a plea before this Court that E.P.No.20 of 2003 was posted on 11.09.2003 for their appearance and because of the non receipt of any notice/letters, they were not aware of the existence of the aforesaid case and the revision petitioners came to know about the exparte decree passed in O.s.No.2077 of 200. Only when the Bailiff came to their premises for executing the warrant of eviction and that the first civil revision petitioner is working in a private apartment as Watchman and his wife, being the second civil revision petitioner is working as a maid servant and they used to go to their job early in the morning and return late in the evening and therefore, they were not served with any notice/summons and that at any point of time they are not refused the processes of the Court.

2.The respondents/decree holders/plaintiffs have filed their counter to the E.A.No.123 of 2003 stating that the civil revision petitioners/J.Ds allowed the entire proceedings to proceed exparte and they showed resistance only at the time of delivery by the Court Amin and that the

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civil revision petitioners/J.Ds. have filed the E.A.No.123 of 2003 to drag on the proceedings with a view to harass the respondents/decree holders and that the application is without any merits.

3.The learned District Munsif, Alandur has passed orders in E.A.No.123 of 2003 on 04.12.2003 inter alia observing that 'as evident from the record since the Judgment Debtors have refused to receive the notice through private service they were called absent and set exparte on 11.09.2003 and delivery also ordered on the same day to be effected by 22.10.2003. As evident from the averments stated in the affidavit, the petitioners/J.Ds. have stated that the E.P. was posted on 11.9.2003 for their appearance and that they have not received any notice in this regard. The contention of the petitioners/J.Ds. cannot be accepted for the reason because as evident from the records they have refused to receive the notice sent through private service they have been set exparte by this Court on 11.9.2003. In view of the above the petitioners/J.Ds. have not shown sufficient cause for their non appearance on 11.9.2003. Hence, the contention of the petitioners/J.Ds. that they were not served any notice and that they have not refused any process at any point of time cannot be accepted and dismissed the application without costs.

4.According to the learned counsel for the civil revision petitioners/J.Ds., the order of the trial Court in E.A.No.123 of 2003 is illegal because the respondents/decree holders/plaintiffs have managed to obtain the service completed without properly serving the notice on the civil revision petitioners and that no opportunity was given to the civil revision petitioners to prove their contentions and that the lower Court has overlooked the fact that the Door number of the plaintiffs and defendants are one and the same and the refusal of endorsement made by the bailiff was taken as a conclusive proof erroneously to complete the service against the civil revision petitioners and therefore prayed for allowing the civil revision petition.

5.In this connection, it is useful to point out that the civil revision petitioners before this Court have earlier preferred C.R.P.(NPD). No.905 of 2007 under Section 115 of C.P.C. as against the orders passed in I.A.No.2287 of 2003 dated 18.9.2006 in O.S.No.2077 of 1997 on the file of the learned District Munsif, Alandur and this Court by an order dated 30.04.2007 has allowed the said civil revision petition and set aside the orders passed in I.A.No.2287 of 2007 in O.S.No.2077 of 1997 dated 18.9.2006.

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6.It is pertinent to refer the relevant portion made by this Court in C.R.P.(NPD).No.905 of 2007 dated 30.04.2007 and the same runs as follows:

> "Since the suit summons have not been served on them and the same has not been served in the manner as provided under the Code of Civil Procedures, I am constrained to hold that the petitioners have known sufficient cause for not appearing before the Court when the case has listed. Since I arrived at the

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conclusion that the petitioners have shown sufficient cause in their application to set aside the exparte decree and their application to condone delay in preferring the said application, the order passed by the Court below is liable to be set aside. (para.19)"

7.In the suit O.s.No.2077 of 1977 a decree was passed on 30.11.2000 as prayed for. Admittedly, the suit in O.S.No.2077 of 1997 on the file of District Munsif cum Judicial Magistrate at Alandur relates to the delivery of vacant possession of B schedule property by the defendants and directing the defendants to pay damages for illegal use and occupation at Rs.250/- per month from 14.06.1995 till the date of delivery of possession to the plaintiffs and for permanent injunction restraining the defendants, men, agents from interfering with suit properties and for cost of the suit.

8.I.A.No.2287 of 2003 filed by the present civil revision petitioners herein earlier before the trial Court relates to condonation of delay of 1014 days in filing the set aside application (under Section 5 of the Limitation Act). As a matter of fact, I.A.No.2287 of 2003 was allowed by the Hon'ble High Court by an order dated 30.04.2007 passed in C.R.P.(NPD). No.905 of 2007.

9.The civil revision petitioners/J.Ds. have filed I.A.No.2043 of 2007 before the trial Court under Order 9 Rule 13 C.P.C. praying to set aside the exparte decree dated 30.11.2000 and it is evident that the arguments on the side of the civil revision petitioners/J.Ds./applicants were heard on 19.11.2007 by the trial Court and the matter was adjourned to 29.11.2007 for hearing the arguments of respondents side and on 13.12.2007, the matter was adjourned to 02.01.2008 for hearing the respondents side arguments, as borne out by records.

10.The learned counsel for the respondents/Decree holders relied on 2003 (7) Supreme 365 (Ravinder Kaur V. Ashok Kumar and another) at page 366 wherein it is held as follows:

"Courts of law should be careful enough to see through diabolical plans of the judgment debtors to deny the decree holders the fruits of the decree obtained by them. This type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing laws delay and bringing bad name to the judicial system."

11.The learned counsel for the respondents/decree holders cited in AIR 1997 SC 1919 (Bhabia Devi V. Permanand Pd. Yadav) wherein it is observed as follows:

"Civil P.C. (5 of 1908), O.9, R.13; O.5, Rr.19,6-Setting aside ex parte decree - Plea of absence of notice - Facts and evidence of process server, however, revealed that petitioner refused to put

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her sign or thumb impression on summon when they were handed to her – She also refused to acknowledge the registered service – Indicative of refusal to accept notice – Ex parte decree rightly passed."

12.He also cited 2006-1-L.W.321 (P.T.Thomas V. Thomas Job) wherein it is observed as follows:

"Section 21, Award of Lok Adalat, Enforcement of, Extension of time, Post Offices Act, Section 27/Endorsement of return of letter unserved, made by Postman, admissibility of, without examining Postman, (Indian) Evidence Act, Section 114/Return of letter unserved, Presumption operates from the endorsement of return made by Postman, C.P.C., Section 96(3)/No appeal lies from decree passed with consent of parties."

13.In 2007 (4) CTC 727 & 728 (Prestige Lights Ltd., V. State Bank of India) it is observed as follows:

"Contempt of Court – Consequences of – Interim order – Duty of litigant is to obey Orders of Court, - Failure to obey Orders of Court, interim or final, Consequences – Orders passed by contempt Court whether interim or final has to be obeyed without any reservation – Refusal to obey Orders or comply with conditions of Order of Court may result in Court refusing to hear party flouting such order on merits of matter – Such action is in larger interest of justice where party obtaining interim relief intentionally and deliberately flouts such order by not abiding terms and conditions on which relief is granted by Court in his favour – Normal rule is that party who has violated interim order has no right to be heard until he purges himself of contempt."

14.The learned counsel for the civil revision petitioners relied on (2002) 5 SCC 377 & 378 (Sushil Kumar Sabharwal V. Gurpreet Singh and Others) wherein it is held thus:

"Civil Procedure Code, 1908 – Or.9 Rr.13 and 6 – Defendant alleging on oath non-service of summons but process server stating on oath that he served the summons – Ordinarily, court of facts should have believed the defendant's statement."

15.It is significant to point out that in the order passed by this Court in C.R.P.(NPD).No.905 of 2007 dated 30.04.2007 it is observed that 'since I arrived at the conclusion that the petitioners have shown sufficient cause in their application to set aside the exparte decree and application to condone the delay in preferring the said application, the order passed by the Court below is liable to be set aside.'

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16.As on date I.A.No.2043 of 2007 filed under Order 9 Rule 13 C.P.C. by the civil revision petitioners/ J.Ds./applicants is pending before the trial Court and the same is not yet disposed off.

17.In E.P.No.20 of 2003 in O.S.No.2077 of 1997 on 04.08.2003 F.N. through post and private service were ordered for the hearing dated 11.09.2003 by the Court below. On 11.09.2003 there is an endorsement in E.P.No.20 of 2003 notes paper that "Fresh Notice Batta by post was not paid and private service taken was returned as refused" and the J.Ds. were called absent and were set exparte and delivery was ordered by 22.10.2003.

18.As a matter of fact, in the notes paper in E.P.No.20 of 2003 for the hearing dated 11.09.2003 there is no indication that the serving Officer has been examined as required under Order 5 Rule 19 C.P.C. In the considered opinion of this Court the word shall "under Order 5 Rule 19 C.P.C. indicates that the said provision is mandatory and not directory". It is also not mandatory for the Court to accept the service of summons merely because it is verified by an affidavit of process server.

19.The civil revision petitioners in E.A.No.123 of 2003 take a stand that they have not refused any process at any point of time and that the first civil revision petitioner is working as Watchman in private apartment and that the second revision petitioner, his wife is employed as domestic servant and they go for their avocation early in the morning and return late in the evening. When such being the position, the Executing Court in E.P.No.20 of 2003 ought to have examined the serving Officer as required under Order 5 Rule 19 C.P.C. before setting the J.Ds. exparte on 11.09.2003. But such a procedure was not adopted by the Executing Court in the instant case on hand. Generally when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred so as to remove injustice in the considered opinion of this Court.

20.From the foregoing discussions, this Court comes to the conclusion that the Civil Revision Petition needs to be allowed and the same is allowed to promote substantial cause of justice. The order passed in E.A.No.123 of 2003 in E.P.No.20 of 2003 in O.S.No.2077 of 1997 by the Executing Court on 04.12.2003 is set aside. The learned District Munsif is directed to hear the arguments of respondents/plaintiffs/decree holders in I.A.No.2043 of 2007 filed under Order 9 Rule 13 C.P.C. by the civil revision petitioners/J.Ds./applicants on 02.01.2008 when the matter is posted and directed to dispose of the said interlocutory application within a week from the date of receipt of a copy of this order.

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21.Considering the facts and circumstances of the case, there shall be no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

sgl

To

1. The District Munsif Court,
Alandur.

2. The Section Officer,
V.R.Section, High Court, Madras.

1 cc To Mr.V.Kannan, Advocate, SR.69084.

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